Supreme Court, U.S.
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82-709

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

NICODEMO SCARFO,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

PETITION

For a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

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QUESTIONS PRESENTED

1. When government investigators are armed with a warrant only authorizing the search for and seizure of a handgun and jogging suit, can the "plain view" exception to the warrant requirement authorize the search and seizure of personal papers which are outside the scope of the warrant and which the investigator must first read to determine their contents?

2. In a case in which all of the government's evidence on the sole issue in dispute is circumstantial, and in which the single most damaging piece of circumstantial evidence introduced at trial was illegally seized in violation of petitioner's Fourth Amendment rights, can the introduction of such evidence be harmless?

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TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Nicodemo Scarfo hereby petitions that a writ of certiorari issue to the United States Court of Appeals for the Third Circuit to review its judgment at No. 81-2181.

OPINIONS BELOW

The opinion of the court of appeals, which has not yet been reported, was filed on July 22, 1982. It is reproduced at A-1. Rehearing en banc was denied on August 16, 1982. The district court's unreported opinion denying petitioner's pretrial motion to suppress is reproduced at A-33.

JURISDICTION

Nicodemo Scarfo was convicted of possession of a firearm by a convicted felon following a trial by jury on indictment No. 81-00010 in the District of New Jersey. On July 7, 1981, Mr. Scarfo was sentenced to two years imprisonment and is now serving that sentence. The judgment below (A-31), affirming the conviction, was filed on July 22, 1982; rehearing en banc was denied on August 16, 1982. (A-32).

This Court's certiorari jurisdiction is established by 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION

The issues presented call upon this court to construe and apply the Fourth Amendment to the Constitution of the United States which provides:

> "Unreasonable searches and seizures.
>
> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or thing to be seized." USCS Constitution, Amendment Four.

STATEMENT OF THE CASE

I. Procedural History of The Case

On December 23, 1979, at 2:00 a.m. investigators from the Atlantic County New Jersey prosecutor's office executed a search and seizure warrant at a second floor apartment at 26 North Georgia Avenue, Atlantic City, New Jersey. The search warrant was issued by a county judge in connection with a state murder investigation. None of the items named and specifically identified in the warrant was seized; however, other items were seized by the county investigators, including a .22 caliber derringer.

Nicodemo Scarfo was subsequently indicted by the State of New Jersey, and he stood trial in connection with that murder investigation. The jury found him not guilty.

Some fourteen (14) months after the search, and subsequent to the state acquittal, a federal grand jury sitting in Camden returned a one-count indictment on January 20, 1981, charging Nicodemo Scarfo with possession of that derringer in violation of Title 18 U.S.C. App. §1202(a)(1) (possession of a firearm by a convicted felon). Following the disposition of pre-trial motions, trial commenced before the Honorable Stanley S. Brotman, United States District Court for the District of New Jersey, and a jury on April 6, 1981. The jury returned a verdict of guilty on April 9, 1981.

Nicodemo Scarfo was sentenced on July 7, 1981, to serve a term of imprisonment of two (2) years and to pay a $5,000 fine. As of this date, Mr. Scarfo is incarcerated and serving his sentence.

II. Statement of The Facts

The derringer in question was found in and seized from a bureau drawer in the master bedroom of the Scarfo residence. The government sought to prove at

trial that Nicodemo Scarfo constructively possessed the derringer in violation of Title 18, U.S.C. App. §1202(a)(1).

Prior to trial, a motion to suppress all items seized pursuant to the search warrant was filed on behalf of the defendant. The warrant only authorized the search for and seizure of a handgun and a jogging suit. Neither of the items sought was found. However, the county investigator did seize the following items from a drawer in a dresser in the master bedroom: a pair of eyeglasses and the derringer in question, which were attached to each other by a rubber band; papers which "appeared to be records of some type, possibly loansharking records or bookmaking records;" a listing of telephone numbers and an envelope containing police reports and newspaper articles. Additionally, the county investigators seized the bottom half of a jogging suit (not the one sought by the warrant) and a bullet-proof vest.

The District Court denied the defendant's motion to suppress and found that the seizure of all the items not mentioned in the affidavit to the search warrant (sic) were justified under the plain view doctrine.

At trial, the government sought to establish constructive possession of the derringer by Mr. Scarfo, and the majority of its evidence was intended to establish that element circumstantially. At the time the derringer was seized Mr. Scarfo was not present, however, Mrs. Scarfo was present and told the investigators that it belonged to her and not to her husband. Investigator Hepburn testified that he did not believe her, but could articulate no basis for his belief. He testified that he did not know who put the derringer in the drawer or when it was put there. When asked if he knew who it belonged to, Investigator Hepburn answered, "(f)rankly, no."

The derringer was located in the master bedroom shared by Mr. and Mrs. Scarfo and was found in a drawer in a dresser in that room. A large portion of the testimony concerned the contents of the dresser and the

drawer in the government's attempt to demonstrate Mr. Scarfo's sole use and custody of that item of furniture.

The drawer in which the derringer was found contained the defendant's passport, pairs of rolled-up socks, a copy of a list of telephone numbers, "miscellaneous documents," and "some reports". The derringer was found in an eyeglass case, and that case was attached by means of a rubber band to another eyeglass case which held a pair of eyeglasses. Mrs. Scarfo stated at the time of the search that the eyeglasses belonged to her husband and that the derringer was hers. An optician testified that the eyeglases seized were identical to a pair of tinted bifocals which his records indicate were prepared for a Mr. Nicholas Scarfo.

The investigators testified that the bureau or dresser appeared to contain men's clothing, that they could not recall what was on top of the dresser, that the closet in the room contained men's clothing, and that female clothing was found in another bedroom.

The Strike Force attorney also presented testimony that the list of telephone numbers found in the dresser drawer was a photocopy of an original list which was found on Mr. Scarfo's person in his wallet when he was arrested.

Upon this evidence and upon the urging of the Strike Force Attorney, the jury found Mr. Scarfo guilty of possession of a firearm by a convicted felon.

The Third Circuit Court of Appeals found that the harmless error doctrine obviated the need to resolve "this close question of the constitutionality of the seizure" (A-6) of the personal papers from the drawer which were used by the government as proof of Mr. Scarfo's possession of the derringer. Accordingly, and over strong dissent (A-13), a majority of a panel of the Third Circuit Court of Appeals affirmed the conviction.

ARGUMENT

The Introduction at Trial of Evidence Seized in Violation of Petitioner's Constitutional Rights Requires Reversal of the Judgment of Conviction and the Granting of a New Trial

I. The "Plain View" Exception to the Warrant Requirement Cannot Justify the Seizure of Papers and Documents Which Must Be Read and Digested Prior to Seizure Where the Warrant Authorized Only Seizure of A Gun and Jogging Suit

The government's case against Nicodemo Scarfo was largely circumstantial. In order to prove his constructive possession of the derringer, the government sought to show his ownership of the contents of the drawer from which it was seized. Accordingly, the government introduced exhibits 7(A) and 7(B), which were miscellaneous personal papers and a copy of a telephone list, respectively.[1]

In *Coolidge v. New Hampshire*, 403 U.S. 433, (1971), this Court reaffirmed its view that the police may seize evidence in plain view without a warrant, so long as they had valid justification for their original intrusion.

> "Of course, the extension of the original justification is legitimate only where it is immediately apparent to the police that they have evidence before them; the 'plain view' doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges." *Id.* at 466 (plurality opinion).

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1. Other items, such as newspaper clippings, police reports and a bullet proof vest, also were seized illegally; however, the trial judge excluded their admission on grounds of relevance. The fact that they also were seized, however, demonstrates that the search was a general one in which items seized randomly were later determined to be useful to the government.

Although a law enforcement officer may be legitimately on the premises pursuant to a warrant authorizing the seizure of enumerated, particularly described articles, that legitimate presence may not be converted to a license permitting a general search.

> "To condone [that behavior] is to invite a government official to use a seemingly precise and legal warrant only as a ticket to get into a man's home, and once inside, to launch forth upon unconfined searches and indiscriminate seizures as if armed with all the unbridled and illegal power of a general warrant." *Stanley v. Georgia*, 394 U.S. 557, 572 (1969) (concurring opinion).

It is clear from the foregoing cases and the numerous decisions of the appellate courts which have interpreted the doctrine that the plain view exception to the constitutional requirement of a warrant specifying the items to be seized is subject to three express requirements: (1) the law enforcement authorities must be lawfully on the premises; (2) the discovery must be inadvertent; and (3) the item's incriminating nature must be immediately apparent.

In this case, the county investigators were lawfully on the premises pursuant to a warrant authorizing the seizure of a handgun and a jogging suit. The questions remain as to whether the seizure of the papers and other documents from the bureau drawer and the bullet-proof vest were "inadvertent" and whether their "incriminating nature" was "immediately apparent" to the investigators. Petitioner contends that these two questions must be answered in the negative.

Investigator Hepburn testified that upon opening the dresser drawer he spotted a passport and a pair of eyeglasses in a case. Upon turning over the eyeglasses, he found the derringer in an eyeglass case and that the two cases were attached by a rubber band. Having thus seized one of the two items arguably specified in the

warrant, he then proceeded to peruse all of the papers in the drawer. The investigator's further search and the examination of the contents of this drawer cannot be justified on the grounds that he sought the jogging suit, since he testified that the only items of clothing in that drawer were rolled-up socks and T-shirts, items which could hardly be mistaken for a jogging suit. Thus, the seizure of documents from the drawer cannot be claimed to have resulted from their inadvertent discovery. Obviously, the investigator intentionally studied all of the papers he could find in order to determine whether something might be useful to him. Clearly, this kind of studied, methodical search is in no way inadvertent. A search for a gun and a jogging suit does not necessitate the reading of personal papers. In *United States v. Dichiarinte*, 445 F.2d 126 (7th Cir. 1971), a defendant, arrested on narcotics charges, consented to permit agents to search his home for narcotics. During the search, the agents seized numerous documents, over the defendant's protest, from various drawers, and those documents were later utilized against him in an investigation of income tax violations. The documents were not introduced against him at his trial. The Court of Appeals for the Seventh Circuit held that the search and seizure of the documents was unreasonable since it went beyond the scope of the consent and that the ruling would be the same had the search been conducted pursuant to a warrant authorizing the seizure of narcotics. *Id.* at 130.

> " . . . (T)he agents went beyond what was necessary to determine whether defendant had hidden narcotics among his personal papers; they read through those papers to determine whether they gave any hint that defendant was engaged in criminal activity. This was a greater intrusion into the defendant's privacy than he had authorized and the fourth amendment requires that any evidence resulting from this invasion be suppressed." *Id.* (footnote omitted).

The court further explained that its holding would be otherwise if the agents had come upon contraband or clear evidence of criminal behavior lying in plain view. "But even though the record is somewhat unclear, it appears that at least some of the items . . . were not in plain view but had to be opened and read." *Id.* at 130-131. The court found that their criminal character was thus not apparent from a "mere surface inspection."

Nor were the items seized in this case of an immediately apparent incriminating nature.[2] Neither the bullet-proof vest nor many of the documents and newspaper articles seized were introduced into evidence at trial. However, the issue of the legality of their seizure is not moot since the seizure of those items cannot be divorced from the contemporaneous seizure of the items which were introduced. It is obvious that the investigators simply hauled in everything that they found interesting, whether incriminatory or not, and then later determined that some items could be useful in this prosecution initiated fourteen (14) months after the seizure and only after the state prosecution had failed to result in a conviction.

Most telling is the relevance of the telephone list admitted as government exhibit 7(B). This list was seized from the dresser drawer during the 2:00 a.m. search of the residence. Exhibit 7(B-1) was an identical list found in Mr. Scarfo's wallet the following morning at 9:30 a.m. when he was arrested. Exhibit 7(B) was apparently a photocopy of Exhibit 7(B-1). The two exhibits were offered at trial to show that the drawer belonged to Mr. Scarfo and contained his personal belongings. There is no testimony from the investigators in the trial record or

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2. An examination of Exhibit 7(A) reveals a collection of documents, many of which are totally innocuous. No testimony was ever offered as to how certain newspaper articles also seized conceivably could have been incriminating. In *United States v. LaValle*, 391 F.2d 123 (2d Cir. 1968), the seizure of newspaper clippings relating to burglaries was held unlawful pursuant to a warrant authorizing the seizure of keys, key-making equipment and lock picks.

in the record of the suppression hearing as to why or how they believed the telephone list to have been of an immediately apparent incriminating nature. Thus, there was absolutely no basis of record upon which the District Court properly could have ruled the seizure justified under the plain view doctrine.

Case law is unusually devoid of guidance as to the meaning of what is "immediately apparent" incriminating material.

> "The panel in *United States v. Berenguer*, 562 F.2d 206, 210 (2d Cir. 1977), rephrased this to read 'its incriminatory nature must be immediately apparent.' We applied this seemingly stricter formulation in *United States v. Diaz*, 577 F.2d 821, 833 (2d Cir. 1978), but found this condition to be satisified. In so confused an area, it seems best to stick to the exact language of the Supreme Court's plurality opinion rather than to embroider on it even slightly.
>
> "The Court has given little guidance as to what it meant by the phrase . . . . Justice Stewart, in *Coolidge*, cites his concurring opinion in *Stanley v. Georgia* . . . . where three Justices concurring would have found unlawful a search in which police, after discovering film reels during a search pursuant to warrant for evidence of bookmaking, viewed the films (on a projector on the premises) and seized them as obscene. See also *United States v. Hunt*, 366 F.Supp. 172, 181 (N.D. Tex. 1973), rev'd on different grounds, 505 F.2d 931 (5th Cir. 1974). Short of this, the question seems to have been raised only in two dissents from denials of certiorari. See *Sedillo v. United States*, 419 U.S. 947 . . . (1974) (Douglas, J., dissenting); *Gentile v. United States*, 419 U.S. 979, 980 n. 1 . . . (1974) (Douglas, J., dissenting)." *United States v. Ochs*, 595 F.2d 1247, 1257 n. 8 (2d Cir. 1979), *cert. denied*, 444 U.S. 937.

The government's contention that the seizure of documents in a drawer is justified under the plain view doctrine, while executing a warrant authorizing seizure of a gun and an article of clothing, stretches the limits of that doctrine beyond countenance. By what authority can investigators study, read and absorb the contents of a substantial number of *documents* while looking for a *gun* and a *jogging suit*, yet claim inadvertence and that their incriminatory nature was immediately apparent? Simply put, if they are looking for a gun and a jogging suit, why are they reading a citizen's personal papers? The vast majority of the cases approving the seizure of documents under the plain view exception involve a warrant which authorized a search for a different kind of document or record not an entirely different object altogether.

Thus, even if portions of Exhibit 7(A) contain bookmaking or loansharking records, and as such could have been seized as evidence of criminal activity, their seizure was unconstitutional in that it was not inadvertent and it was not immediately apparent that the items were of an incriminatory nature. Since no other justification was put forth for the seizure of the remainder of the personal papers constituting Exhibit 7(A) nor for the seizure of Exhibit 7(B), these seizures cannot be justified under the plain view doctrine, and the admission of these items into evidence was error.

II. The Introduction of Illegally Seized Evidence Was Not Harmless Error In This Case

The Third Circuit Court of Appeals failed to apply the rule of this Court in *Chapman v. California*, 386 U.S. 18, 25-26 (1967) requiring the government to establish that the constitutional violation did not contribute to the verdict. As the vigorous dissent by Circuit Judge John J. Gibbons observes, the Third Circuit Court of Appeals has interpreted the *Chapman* rule to require

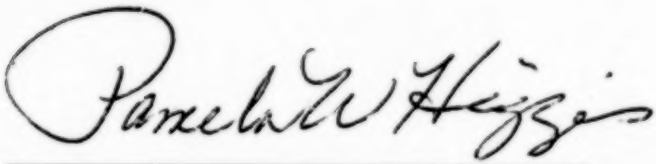
the government to demonstrate that the illegally obtained evidence "could not have influenced the factfinder's determination." *United States v. Molt*, 615 F.2d 141, 146 (3d Cir. 1980). See also, *Government of the Virgin Islands v. Bell*, 392 F.2d 207, 209 (3d Cir. 1978). No such showing could have been made in this case since the telephone list seized and introduced as Exhibit 7(B) was the strongest piece of circumstantial evidence in this case which was entirely circumstantial on the sole issue in dispute — possession. The telephone list, Exhibit 7(B), was found in the drawer near the gun; it was a copy of the original list which was later found in and seized from Mr. Scarfo's wallet. While indeed there was other circumstantial evidence of his possession, clearly this list and the other papers seized from the drawer were critical to the government's case. This fact was stressed in Circuit Judge Gibbons' dissent (A-16): "Indeed, I am persuaded to a moral certainty that the jurors did rely upon the strongest piece of circumstantial evidence in the case, as both the trial judge and the prosecutor anticipated they would."

Thus, the introduction at trial of illegally seized evidence was not harmless error. Petitioner's conviction should be reversed and a new trial granted.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and order of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,



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